No. 92-515

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Wisconsin

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Brief of Amici Curiae States of Ohio, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, and The District of Columbia In Support of Petitioner

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INTEREST OF THE AMICI CURIAE

The Amici States have attempted to regulate the growing problem of hate crime in America by passing laws that punish crime in which the victim is intentionally selected because of his or her race, ethnicity, religion, or other discriminatory distinction.[1] These laws are substantially similar in effect to the Wisconsin statute now before this Court. Indeed, challenges to similar laws from Ohio and Oregon are presently the subject of petitions for certiorari pending before this Court.[2]

Citizens of the Amici States have been criminally intimidated, harassed and assaulted solely because of their race, ethnicity, religion, or other discriminatory distinction. Furthermore, the incidence of hate crime is increasing. The Amici States have a compelling interest — indeed a duty — to combat the pernicious effects of such crime on victims and on society as a whole. That interest, recognized as compelling since Reconstruction, is no less compelling today.

Amici recognize their important responsibility to protect the civil rights of their citizens and to preserve the peace and order necessary to maintain the social fabric of society. By enhancing penalties for crime committed by reason of the victim's status, Amici are adopting responsive and responsible measures to ensure that their citizens' civil rights are protected. Indeed, such statutes are no different than

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[1] Forty-six states have passed legislation generically referred to as "hate crime" statutes. Many of these statutes are based on model hate crime statutes promoted by the Anti-Defamation League of B'nai B'rith. For a list of these statutes, see compendium to *Hate Crimes Statutes; A Response To Anti-Semitism, Vandalism, and Violent Bigotry*, Anti-Defamation League of B'nai B'rith (1990); and *Hate Crimes Statutes: A 1991 Status Report*, Anti-Defamation League of B'nai B'rith (1991).

[2] *State v. Wyant*, 64 Ohio St.3d 566, 597 N.E.2d 450 (1992) (Court struck down Ohio Revised Code §2927.12); *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992) (court upheld Oregon Revised Statutes §166.165(1)(a)(A)). The case numbers in this Court respectively are *Wyant*, No. 92-568, *Plowman*, No. 92-6702.

other federal and state antidiscrimination laws. Amici are also concerned with preserving the rights granted by the First Amendment. But those protections cannot be used to shield violations of the civil rights of others. The First Amendment cannot flourish in a society in which a substantial number of citizens are denied their civil rights by the commission of hate crime.

The faulty analysis of the court below threatens all hate crime statutes and undermines the ability of state legislatures to vindicate important societal interests. The threat is not limited to hate crime statutes. The Amici States have enacted civil antidiscrimination measures, including, in several of the Amici States, civil tort actions in which recovery is allowed for "hate violence" committed against the victim by reason of status. Amici urge this Court to uphold the constitutionality of the Wisconsin statute and allow the states to satisfy their obligation to protect their citizens from acts which constitute invidious discrimination.

SUMMARY OF ARGUMENT

In response to the terrible and growing problem of "hate crime" plaguing this nation, many states, including Wisconsin, have enacted laws punishing crime committed "by reason of" the victim's status. Hate crime is more harmful to victims than crime committed for non-status reasons, because of the physical, psychological, and emotional effects of such crime. Hate crime is also more harmful to society, because such crime invites escalation and retaliation by other members of the victim's class.

Most important, hate crime deprives people of the full enjoyment of their civil rights. The interest of society in preventing and punishing this type of crime is "compelling." Even while striking down one measure aimed at biased speech, this Court in *R.A.V. v. City of St. Paul*, 505 U.S. ____, 112 S.Ct. 2538 (1992), recognized the compelling nature of this interest.

This Court has always recognized the right of government to prevent deprivations of its citizens' civil rights. From Reconstruction forward, Congress has passed several antidiscrimination statutes regulating conduct committed by reason of the status of the victim. Amici States have also passed numerous antidiscrimination statutes regulating the same conduct. This Court has never held such statutes to be unconstitutional, even though "racial" or other class "animus" is an essential element of such statutes.

Class animus is the essence of invidious discrimination. This Court has repeatedly held that "acts of invidious discrimination . . . are entitled to no constitutional protection." *Roberts v. United States*, 468 U.S. 609, 628 (1984). In *R.A.V.*, this Court reaffirmed that antidiscrimination statutes are permissible regulations consistent with the First Amendment. *R.A.V.*, 505 U.S. ____ , 112 S.Ct. at 2546-7.

Federal legislation requiring proof of class animus as an element of a claim has not been limited to civil statutes. Several federal criminal statutes punish conduct committed "because of" the victim's status. *See e.g.* 18 U.S.C. §242. The Reconstruction Congress enacted such legislation in response to the "hate crime" of that era. Those "criminal" antidiscrimination laws, like their civil counterparts, have been repeatedly applied and upheld by this Court.

Just like the federal statutes, state "hate crime" statutes are antidiscrimination measures, designed to protect the civil rights of their citizens. The Wisconsin statute at issue is not directed at speech or thought, but at conduct — "hate crime." Such a statute does not violate the First Amendment. "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

This Court's decision in *R.A.V.* does not change this well established rule nor require invalidation of the Wisconsin statute. The fault of the St. Paul ordinance was that it was directed at the "message" and not the conduct by which the message was conveyed. In contrast, the Wisconsin statute is directed at conduct, since commission of a crime

is required. *R.A.V.* specifically recognizes that a statute directed at conduct, not speech, does not run afoul of the First Amendment.

This Court has repeatedly upheld, against First Amendment challenge, legislation directed at the non-expressive elements of conduct. *United States v. O'Brien*, 391 U.S. 367 (1968). The Wisconsin statute meets all of the *O'Brien* tests. The state has the power to punish criminal conduct; there is a compelling state interest in regulating the conduct herein; the state's interest is unrelated to expression; and the statute is narrowly tailored to regulate only crime, not speech or thought.

The court below misapprehended the Wisconsin statute. The basis for such a statute, like federal antidiscrimination statutes, is the offender's intentional selection of a victim. Offenders may hold whatever thoughts they wish or speak any idea; they simply may not convert their thoughts or speech into the commission of a crime.

The court below purported to distinguish between the Wisconsin statute and antidiscrimination laws, but the distinctions do not withstand analysis. It failed to explain why it is proper to consider racial or other class animus in some antidiscrimination laws, yet improper here. Racial or other class animus is the very basis of selection of the victim in antidiscrimination statutes. The constitutional analysis should not differ for hate crime statutes which require the same types of animus. Moreover, just as in 18 U.S.C. §242, the Wisconsin statute relates to an objective manifestation of discrimination — the commission of a crime.

The court below erroneously assumes that motive to commit a crime may never be punished. However, this Court's decision in *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality), counsels that motive may be considered as an element of punishment if it is material to the commission of a crime.

A legislature, as well as a sentencing judge as in *Barclay*, may consider the motive of "intentional selection" when it is material to assessing punishment.

ARGUMENT

I. THE STATES HAVE A COMPELLING INTEREST IN PREVENTING HARM TO MEMBERS OF GROUPS WHO ARE SUBJECT TO DISCRIMINATION BECAUSE OF THEIR RACE, ETHNICITY, RELIGION, OR OTHER DISCRIMINATORY DISTINCTION.

A. The States Have A Compelling Interest In Protecting Their Citizens' Civil Rights By Addressing The Surge In Crime Committed Because Of A Victim's Race, Religion, Ethnicity, Or Other Discriminatory Distinction.

Denial of civil rights on the basis of race, ethnicity, religion, or other discriminatory distinction has not disappeared; on the contrary, it is experiencing a resurgence and manifesting itself in the commission of crime in which the victim is selected because of his or her status.

"Hate crime" has increased all across the nation, along with a broadening of the classes of perpetrators and targets. William M. Welch, *Tensions Between Clashing Cultures Lead To More Hate Crimes*, The Associated Press, September 9, 1991, Washington Dateline Section. In New Jersey, such crime increased 18 percent in 1991, the fourth increase in a row. Jerry Gray, *Bias Crime Rate Up 18%, And Juveniles Led The Surge*, New York Times, April 4, 1992, §1 at 29. Similarly, Los Angeles County reported that hate crime reached record levels in 1991, increasing 22% over 1990 levels and constituting the seventh consecutive year for an increase. Stephanie Chavez, *Hate Crimes Set A Record In L.A. County*, Los Angeles Times, March 20, 1992 §A at 1 ("L.A. Hate Crimes").

These statistics are not anomalous. The number of anti-Semitic incidents committed across the nation during 1990 was the highest total ever reported in the 12 years that the Anti-Defamation League has compiled such reports and statistics. *Hate Crimes Statutes: A 1991 Status Report*, Anti-Defamation League of B'nai B'rith (1991) at p. 1. "Everyone who collects data reports a steady increase in hate crimes in the last year or two." Daniel Goleman, *As Bias Crimes Seem To Rise, Scientists Study Roots Of Racism*, New York Times, May 29, 1990, §C at 1 ("*Roots of Racism*").[3] Congress itself responded to this phenomenon when it enacted the Hate Crime Statistics Act of 1990, Pub. L. 101-275, 104 Stat. 140.

Not only is there an increase in the number of occurrences of hate crime, there is also a disturbing rise in the level of violence visited on its victims. Researchers have found that hate crime is often vicious; hate crime assaults are "far more lethal than other kinds of attacks, resulting in hospitalization of their victims four times more often than is true for other assaults." *Roots of Racism at 1. See also L.A. Hate Crimes.* Moreover, hate crime often "wound[s] the psyche more than the body and leave[s] a residue of painful distrust and fitful dreams." N.R. Kleinfield, *Bias Crimes Hold Steady, But Leave Many Scars*, New York Times, January 27, 1992, §A at 1.

Hate crime harms more than just the individual victim. It is directed at all members of a victim's group; such crime often provokes counterattacks. Judie Glave, *Hate Crime Against Children Sparks Concern In A Hard Town*, The

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[3] *See also*, Note, *Combatting Racial Violence: A Legislative Proposal*, 101 Harv. L. Rev. 1270, 1270 (1988) (citing sources that found "an alarming trend of increased racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country.") Note, *Bias Crimes: Unconscious Racism In The Prosecution Of "Racially Motivated Violence"*, 99 Yale L.J. 845, 846 (1990); Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement And Federal Civil Rights Remedies*, 75 J. Crim. L. & Criminology 103, 103 (1984).

Associated Press, January 10, 1992, Domestic News Section. For this reason, hate crime may set in motion a series of events that ultimately escalates into mob violence. *See* Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 Stanford Law and Policy Review 165 (Winter 1992-93). Plainly, crime motivated by prejudice has an impact on the community far more severe than that resulting from similar acts committed without discriminatory selection as their impetus. As the American Bar Association Section of Criminal Justice reported:

> [C]rimes motivated by bias have a far more pervasive impact than comparable crimes that do not involve prejudice *because they are intended to intimidate an entire group.* The fear they generate can therefore victimize a whole class of people. Furthermore, our country is founded on principles of equality, freedom of association, and individual liberty; as such, bias crime tears at the very fabric of society.

Peter Finn, *Bias Crime: Difficult to Define, Difficult to Prosecute*, Criminal Justice, Summer 1988, at 19, 20 (emphasis in original). The Oregon Supreme Court correctly relied on a similar rationale in upholding its state's hate crime penalty enhancement law:

> Such crimes — because they are directed not only toward the victim, but, in essence, toward an entire group of which the victim is perceived to be a member — invite imitation, retaliation, and insecurity on the part of the persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived to be possessed by the victim, that have historically been targeted for wrongs. Those are harms that the legislature is entitled to proscribe and penalize by criminal law.

State v. Plowman, 314 Or. 157, 838 P.2d 558, 564 (1992).

There is another well-recognized, destructive effect of hate crime. As early as the Reconstruction period, Congress observed that the commission of crime against persons because of their race deprived those persons of the full measure of their rights of citizenship, particularly where the crime was in the nature of intimidation, harassment, and assault. *See* S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (Report of C. Schurz); *United States v. Price*, 383 U.S. 787 (1966) (recounting remarks of Sen. Pool of North Carolina on sponsoring portions of the Enforcement Act of 1870). This is no less true today. See *Levin, supra.*

In the face of this history and evidence, Wisconsin and other states, in addition to the myriad of civil antidiscrimination statutes, have enacted or considered enacting criminal laws regulating crime in which the victim was selected because of his or her race, ethnicity, religion, or other discriminatory distinction. These laws include laws providing a penalty enhancement for the commission of discriminatory crime. The purpose of these statutes is to prevent this violent form of discrimination and its invidious effects on the citizenry.

B. The Decision In *R.A.V. v. City of St. Paul* Confirms That The States Have A Compelling Interest In Regulating Hate Crime.

The governmental interest in preventing deprivation of civil rights because of hate crime is compelling. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("[A]cts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent . . . ").

This Court recently reaffirmed that the states' interest is compelling. *R.A.V. v. City of St. Paul*, 505 U.S. ____ , 112 S.Ct. 2538 (1992). While striking down the infirm St. Paul ordinance, this Court nevertheless confirmed that government has a compelling interest in ensuring "the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members

to live in peace where they wish." *R.A.V.*, 505 U.S. at ____, 112 S.Ct. at 2549. This view was reinforced by Justice White in concurrence:

> [T]he city's judgment that harms based on race, color, creed, religion or gender are more pressing public concerns than the harms caused by other fighting words . . . is plainly reasonable. Indeed, as the majority concedes, the interest is compelling.

R.A.V., 505 U.S. at ____, 112 S.Ct. at 2556 (White, J., concurring in the judgment). The discrimination caused by hate crime imposes terrible costs on individual victims and on society as a whole. States clearly have a compelling interest in fighting these devastating effects.

II. STATES CAN SERVE THE COMPELLING INTEREST OF PREVENTING HATE CRIME THROUGH ANTIDISCRIMINATION STATUTES.

A. This Court Has Always Recognized The Right Of Government To Prevent Invidious Discrimination.

Since the days of Reconstruction, Congress has enacted antidiscrimination statutes to protect citizens' rights.[4] In the civil context, 42 U.S.C. §§1983, 1985, and 2000e make actionable various acts taken against a person because of

[4] The events that led to the enactment of the Reconstruction civil rights laws are remarkably similar to those that impelled the states to adopt statutes such as the one at issue in this case. *See* Stampp, *The Era of Reconstruction 1865-1877* (1965); *Jones v. Alfred M. Mayer Co.*, 392 U.S. 409 (1968). Senator Pool of North Carolina, sponsoring portions of the Enforcement Act of 1870, stated the need for such legislation:

> We have heard on former occasions on the floor of the Senate that there were organizations which committed outrages, which went through communities for the purpose, of intimidating and coercing classes of citizens in the exercise of their rights. We have been told here that perhaps it might be well that retaliation should be resorted to unless the

his or her race or other discriminatory distinction. Indeed, class animus is an essential element of those statutory torts:

> The constitutional shoals that would lie in the path of interpreting 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - by requiring as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

Griffen v. Breckenridge, 403 U.S. 88, 102 (1971).

Most recently, in *Bray v. Alexandria Women's Health Clinic*, ____ U.S. ____, 61 U.S.L.W. 4080 (1993), this Court held that §1985(3) could not be invoked to prevent abortion opponents from blockading the entrance to an abortion clinic. Significantly, the Court reaffirmed that the animus element "demand[s] . . . at least a purpose that focuses upon" a person of a protected class "*by reason of*" their inclusion in that class. 61 U.S.L.W. at 4081-82 (emphasis in original).

Bray is the most recent of a long and consistent line of decisions that has held that discriminatory animus against protected classes is an essential and appropriate element of many antidiscrimination laws. Although this Court has debated at times the reach of the federal antidiscrimination statutes, it has never questioned Congress' power to protect persons from discrimination on the basis of race or other

[4] ***Footnote 4 cont.***
Government of the United States interposes to command and to maintain the peace; when there will be retaliation and civil war; when there will be bloodshed and tumult in various communities and sections. It is not only necessary for the freedmen, but it is important to the white people of the southern section, that by plain and stringent laws the United States should interpose and preserve the peace and quiet of the community.

Price, 383 U.S. at 809 (appendix) (quoting from Cong. Globe, 41st Cong., 2nd Sess., pp. 3611-3613).

characteristic. *See, e.g., United States v. Williams*, 341 U.S. 70, 72 (1951); *Jones, supra; Griffen, supra.*

Nor has the power to combat the effects of discrimination been limited to Congress. There are literally thousands of state antidiscrimination laws, both civil and criminal. *See, e.g.*, Ohio Revised Code §4112.02, prohibiting a host of unlawful discriminatory practices — civil, and Ohio Revised Code §2927.03, penalizing interference with fair housing rights - criminal. These statutes are an attempt by the states to be an equal partner with Congress in the protection of their citizens' civil rights. In addition to "hate crime" statutes, like the Wisconsin statute at issue, several of the Amici States have special tort statutes that allow recovery of compensatory and punitive damages for victims of hate violence. *See, e.g.*, Ohio Revised Code §2307.70; Va. Code Ann. §8.01-42. It has never been doubted that the states can regulate the effects of discrimination. Indeed, the Court has often recognized that states may provide greater protections for their citizens than those directly required by federal law. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 273 (1987) (state statute providing greater protection against pregnancy discrimination upheld, since statute not preempted by Title VII).

These statutes, prohibiting invidious discrimination because of race or other identifying characteristic, have never been held to be proscribed by the protections of the First Amendment. *Roberts*, 468 U.S. at 628 ("[A]cts of invidious discrimination . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, are entitled to no constitutional protection."); *Hishon v. King & Spalding*, 467 U.S. 69, 78(1984) ("[I]nvidious . . . discrimination . . . has never been accorded affirmative constitutional protection".); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (" '[T]he constitution places no value on discrimination' . . . and while '[i]nvidious private

discrimination may be characterized as . . . protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.' ").

R.A.V. affirms that the First Amendment presents no barrier to legislation protecting citizens from discrimination. The opinion recognized that:

> a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example sexual derogatory "fighting words" among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. §2000e-2; 29 CFR §1604.11 (1991). See also 18 U.S.C. §242, 42 U.S.C. §§1981, 1982. Where government does not target conduct on the basis of expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

R.A.V., 505 U.S. at ____ , 112 S.Ct. at 2546-7.

B. The Principle That Unlawful Intent To Discriminate May Be Regulated Applies To Criminal As Well As Civil Statutes.

The First Amendment does not bar the government from imposing criminal sanctions for discriminatory activities undertaken by reason of the status of the victim. This Court in *R.A.V.* made a specific approving reference to 18 U.S.C. §242 as a regulation which is permissible under the First Amendment. 505 U.S. ____ , 112 S.Ct. at 2546.

18 U.S.C. §242 makes it a crime to deprive a person of his or her rights by reason of race or color.[5] *See United*

[5] Section 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State,

States v. White, 788 F.2d 390 (6th Cir. 1986) (firebombing of a victim's house, because the victim had been selected "by reason of race," violates statute). The goal of §20, the predecessor of §242, was "to protect all persons in the United States in their civil rights and furnish the means of their vindication." Cong. Globe, 39th Cong. 1st Sess. p 211. (remarks of Senator Trumbull, Chairman of the Senate Judiciary Committee). *Screws v. United States*, 325 U.S. 71, 98 (1945). (The "great purpose [of §242 is] the protection of the individual in his civil liberties".).

Other federal criminal statutes also prohibit the commission of certain acts on the basis of race or other discriminatory distinction. 18 U.S.C. §243 precludes the exclusion of jurors on account of race or color; 18 U.S.C. §245 prohibits a variety of deprivations involving voting, and public accommodations on the basis of race, color, religion, or national origin. 18 U.S.C. §247 prohibits the "obstruction of persons on the basis of free exercise of religion" and 18 U.S.C. §1091 prohibits "genocide" - the most terrible example of selecting members of a group as victims for commission of crime.

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[5] ***Footnote 5 cont.***

Territory or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, *on account of such inhabitant being an alien, or by reason of his color, or race*, than are prescribed for the punishment of citizens . . .

Although the Court in *United States v. Classic*, 313 U.S. 299, 326 (1941) noted that the specific reference to "by reason of his color or race" is limited to "different punishments, pains, or penalties," it is also clear that the more general "deprivation of any rights, privileges, or immunities secured or protected by the Constitution" includes deprivation by reason of race or color. As illustrated by Justice Rutledge's concurrence in *Screws v. United States*, 325 U.S. at 123, n. 20, and held in later cases, the more general language of the first sentence of 18 U.S.C. §242 is intended to encompass more rights than the right not to be discriminated against on the basis of race or color, but certainly includes that right as well. *See Williams v. United States*, 341 U.S. 97 (1950); *United States v. Guest*, 383 U.S. 745 (1966); *Price, supra*.

As with civil antidiscrimination laws, the courts have never questioned the ability of Congress or the states to criminalize conduct committed because of the race or other discriminatory distinction of the victim. Indeed, the failure of the government to allege in an indictment and prove that the acts of the defendant were motivated by racial discrimination has been deemed sufficient reason to dismiss a criminal indictment for a violation of §242. *Guest, supra. See also Screws*, 325 U.S. at 106. ("It could hardly be doubted that they who 'under color of any law, statute, ordinance, regulation, or custom' act with . . . evil motive violate §20").

III. THE WISCONSIN STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT REGULATES CONDUCT, NOT SPEECH.

A. As With Other Discrimination Laws, The Wisconsin Legislation Targets The Conduct Of Selecting A Victim Who Belongs To A Protected Group For Harm.

These state statutes employ similar language to that used by §242 to link the commission of an act to the intent to select a member of a particular group to be the victim of the act. *Compare* 18 U.S.C. §242 (using phrase "by reason of") *with* Wisc. Stat. §939.645 (using the term "because of"). Just as Congress has done, the states have sought to address the problem of the denial of civil liberties on the basis of race or other discriminatory distinction by separately penalizing such conduct.

A hate crime statute like Wisconsin's is an antidiscrimination statute. Like other antidiscrimination statutes, these statutes forbid discriminatory conduct against victims because of their status. The discriminatory conduct addressed in each is the selection of members of those groups for treatment, or more often, mistreatment, on the basis of their status. Penalty enhancement statutes like Wisconsin's target conduct, not speech, and therefore do not run afoul of the First Amendment.

B. Inclusion Of The Element Of Intent To Discriminate Does Not Render The Wisconsin Statute A Direct Regulation Of Speech.

Wisconsin's statute, like other antidiscrimination laws, does not forbid anyone from speaking or thinking anything, no matter how obnoxious or undesirable the speech or thought may be. Rather, the statute addresses the compelling state interest in remedying invidious acts of discrimination by condemning the selection of certain persons for criminal harm because of their status.

Judge Bablitch, who dissented from the decision below, expressed this concept well:

> [The Wisconsin statute] is not concerned with speech or thought. It is concerned with intentional selection. It becomes operative not just when a person's speech evinces the discriminatory selection but rather anytime the choice of a victim from a protected class is shown to be selective rather than random, discriminating rather than indiscriminate, or designed rather than happenstance.

State v. Mitchell, 169 Wis.2d 153, 485 N.W.2d 807, 824 (1992). In this, the law is no different from countless federal antidiscrimination statutes, which turn on "selection" of the victim. *Mitchell*, 485 N.W.2d at 821 (Bablitch, J., dissenting). When a person acts upon thought or speech to the detriment of others, he may not lay claim to the protection of the First Amendment. "The First Amendment does not protect violence." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). Nor does it protect against violence by reason of discriminatory distinction. As this Court held in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), there is not ". . . an apparently limitless variety of conduct [that] can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.".

The opinion of the Wisconsin Supreme Court ignored this fundamental point when it concluded that the statute punished speech or thought. The statute is directed at conduct and "those who choose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden". *Barnes v. Glen Theatre, Inc.*, 501 U.S. ____ , 111 S.Ct. 2456, 2468 (1991) (Scalia, J., concurring). The inclusion of the element of intentional selection in these statutes does not somehow convert the law from one punishing discriminatory activity to one punishing thought. Rather, it merely reflects an entirely appropriate legislative judgment that the harm occasioned by this form of criminal conduct merits more substantial sanction.

C. The Court's Decision In *R.A.V.* Does Not Require Invalidation Of A Statute Aimed At Conduct Rather Than Speech.

This Court's decision in *R.A.V.* does not require invalidation of a statute, like the Wisconsin law, aimed at conduct, not speech. In contrast to the decision of the court below, other state courts have recognized the fundamental difference between these statutes and the St. Paul ordinance. *Plowman, supra; Dobbins v. State of Florida*, Case No. 91-1953 (Fla. 5th D.Ct. September 25, 1992), 1992 Fla. App. LEXIS 10062.

The St. Paul ordinance in *R.A.V.* was flawed because it was directed at the content of speech, rather than discriminatory conduct. The Wisconsin statute, on the other hand:

> punishes the act of discriminatory selection plus criminal conduct, not the thought or expression of bigotry. The Constitution allows a person to have bigoted thoughts and to express them, but it does not allow a person to act on them.

Mitchell, 485 N.W.2d at 820 (Bablitch, J., dissenting). As *R.A.V.* explained, antidiscrimination statutes such as 18 U.S.C. §242, which prohibit the intentional selection of a victim of crime

by reason of status, proscribe conduct, not the message expressed. *R.A.V.*, 505 U.S. at ____ , 112 S.Ct. at 2547.

Because the Wisconsin statute is directed at conduct, not speech, First Amendment cases involving content-discrimination among classes of speech are inapplicable. But even if the statute invokes content-discrimination, it is a permissible regulation because it does not target conduct for the purpose of stifling expressive content. Thus, the activity governed by the Wisconsin statute is not shielded from regulation merely because an offender might claim to be expressing a discriminatory idea or philosophy through it. *R.A.V.*, 505 U.S. at ____ , 112 S.Ct. at 2546.[6] Any penalty imposed upon a discriminatory idea or philosophy is merely incidental to the legitimate regulation of conduct:

> As long as . . . discriminatory behavior . . . is being regulated, the First Amendment is not offended, for . . . the penalty exacted on speech in such cases is incidental to the governmental purpose of regulating the purely non-expressive component of the conduct.

Statement of Rodney A. Smolla, Arthur B. Hanson, Professor of Law and Director of the Institute of the Bill of Rights at the College of William and Mary, before the Subcommittee on Crime and Criminal Justice of the U.S. House of Representatives regarding H.B. 4797,[7] July 29, 1992, at 38-39.

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[6] The Wisconsin statute would also fall into other exceptions to application of the First Amendment. Because the regulation is focused on conduct directed at certain persons or groups, "there is no realistic possibility that official suppression of ideas is afoot". *R.A.V.*, 505 U.S. at ____ 112 S.Ct. at 2547. Moreover, racial or religious crimes have "special force" when applied to the victim. "[S]uch a reason [the threat of harm] having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class". *R.A.V.*, 505 U.S. at ____ 112 S.Ct. at 2546. *See also Watts v. United States*, 394 U.S. 705 (1969).

[7] Bill proposing "The Hate Crimes Sentencing Enhancement Act of 1992", H.B. 4797, 102nd Cong., 2nd Sess. (1992).

Legislation directed at non-expressive elements of conduct has repeatedly been upheld in the face of First Amendment challenge. *O'Brien, supra* (regulation of the draft); *Watts, supra* (threats against the president); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (closure of adult book store as nuisance); *Barnes, supra* (nude dancing). In *O'Brien*, this Court established a four-part test for assessing the constitutionality of conduct that may constitute symbolic speech. The test is whether the regulation is within the power of government to enact, whether the regulation furthers an important or substantial governmental interest, whether the regulation is aimed at the suppression of free expression, and whether the regulation imposes the least restrictions necessary to further that interest. *O'Brien*, 391 U.S. at 377.

Each element of the *O'Brien* test is satisfied by the Wisconsin statute. First, it is indisputedly within the power of state government to regulate and prohibit criminal conduct. Even while contending that the means chosen in this particular case were inappropriate, the majority in the court below never doubted the authority of the State to proscribe the conduct herein. *Mitchell*, 485 N.W.2d at 816.

Second, the states have a judicially acknowledged compelling interest in addressing invidious discrimination against their citizens. *Roberts, supra.* Here, in particular, that discrimination causes substantial harm to individuals, such as the deprivation of their civil rights. It also causes harm to society as a whole.

Third, the interest of a state in regulating this discrimination has no relationship to the suppression of free expression, for a state has a legitimate interest in preserving the civil rights of its citizens apart from and unrelated to any interest in suppressing the free speech rights of other of its citizens. *Roberts*, 468 U.S. at 628 ([Government may regulate acts of invidious discrimination] "wholly apart from the point of view such conduct may transmit.") *See also Finn, supra.* Wisconsin has chosen a method with its statute that does not prohibit speech or thought, only criminal action.

Fourth, the reach of the statute is no greater than is necessary to achieve its end. Like other antidiscrimination statutes, the Wisconsin statute is aimed exclusively at the intentional selection of victims because of their race or other status — not at the abstract thought or speech of the offender. Indeed, the "tight nexus between the selection of the victim and the underlying crime" demonstrates that the statute is properly measured. *Mitchell*, 485 N.W.2d at 189 (Abrahamson, J., dissenting). Even in the context of the direct regulation of speech, this Court has recognized that a strictly focused regulation can survive review. *See Burson v. Freeman*, 504 U.S. ___ , 112 S.Ct. 1846 (1992) (plurality opinion) (anti-electioneering statute upheld against First Amendment challenge where the restriction was logically connected with the state's interest in preventing voter intimidation and fraud).

IV. THE ANALYSIS OF THE WISCONSIN SUPREME COURT IS FLAWED BECAUSE THE WISCONSIN STATUTE DOES NOT SUPPRESS ABSTRACT THOUGHT.

A. The Wisconsin Statute Does Not Require Proof Of Motive In A Manner That Differs In Degree Or Kind From Other Antidiscrimination Laws.

The lower court misapprehended the focus of the Wisconsin statute. The statute is violated if a predicate offense is committed and if the victim is selected because of his or her status. Like other antidiscrimination laws, it makes no difference whether the perpetrator felt bias, prejudice, or something altogether different toward the victim. Moreover, the fact that the Wisconsin statute requires a showing of discrimination is no more offensive to the Constitution than is the same requirement contained in 42 U.S.C. §1985(3). *See Bray*, ___ U.S. ___ , 61 U.S.L.W. at 4082. ("Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group") (citations omitted).

The lower court attempted to distinguish the Wisconsin statute from other antidiscrimination laws which it characterized as being aimed at "objective manifestations of discrimination," such as a failure to hire a person, rather than at motive. The court's distinction is not persuasive, particularly since the Wisconsin statute and federal antidiscrimination statutes contain identical elements. The basis for all antidiscrimination laws is the "selection" of a person based on status. In many instances, an act (e.g., the termination of employment) is not unlawful in and of itself. It becomes so only because a person has been intentionally selected for firing "by reason of" his or her race, ethnicity or religion. These laws reflect a legislative judgment that such selection deprives persons of their civil rights. A law that enhances penalties when a crime is committed in which the victim was selected on the basis of his or her race, ethnicity, or religion entails a similar legislative judgment and should similarly be upheld.

To accept the analysis of the court below, it is ultimately necessary to confront the question posed by Judge Bablitch in his dissent - why is the element of intentional selection on the basis of race or other status constitutionally appropriate in a statute which makes otherwise legal activity illegal, but violative of the First Amendment when relied on to enhance a penalty for conduct the state can concededly punish in the first instance? *Mitchell*, 485 N.W.2d at 820.

The lower court, however, avoided the question. Rather, to explain its result, it created an "objective act" distinction between admittedly valid antidiscrimination laws and the Wisconsin statute. This distinction is premised upon the lower court's construal of the Wisconsin statute as punishing the "subjective motivations" of the actor. In contrast, the court below discerned that other antidiscrimination laws prohibit only the object of the discrimination e.g., termination of employment. This mode of analysis is fallacious. An objective act (termination of employment by breach of contract) may be wrongful in and of itself, but becomes "discriminatory" solely because of the subjective motivation of the actor.

Moreover, it is simply incorrect to say that the Wisconsin penalty enhancement statute does not punish an objective manifestation of discrimination. Just as is true of 18 U.S.C. §242, the Wisconsin statute punishes the objective commission of a crime. If the *Mitchell* majority is correct that the discriminatory motive requirement of the Wisconsin statute suppresses abstract thought, it offers no justification why the identical requirement under antidiscrimination statutes does not also suppress abstract thought.

B. The Constitution Does Not Prohibit Consideration Of A Perpetrator's Motive When It Is Material To The Commission Of A Crime.

The lower court's analysis assumes without basis that punishing a motive to commit a crime inherently involves punishing protected speech and the abstract thought behind that motive. Indeed, the court went so far as to accept one commentator's assertion that "motive cannot be a criminal offense or an element of an offense". *Mitchell*, 485 N.W.2d at 813 n.11 (quoting Susan Gellman, *Sticks And Stones Can Put You In Jail But Can Words Increase Your Sentence?, Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333, 364-5 (1991)). The court below engaged in a discussion of the difference between motive and intent as generally used in the criminal law. However, the court below erred in focusing on "labels" rather than the fundamental question — whether the statute is aimed at conduct, not speech or thought.

It is simply wrong that motive to commit a crime can never be an element of an offense. *See, e.g., Screws*, 325 U.S. at 101 ("An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime.") A motive to commit a crime may be punished if the motive triggers the conduct that the legislature has an interest in preventing.

Thus, in *Dawson v. Delaware*, 503 U.S. ___ , 112 S. Ct. 1093 (1992) and *Barclay v. Florida*, 463 U.S. 939 (1983)

(plurality), this Court determined that a general motive may be punished if it is material to the conduct proscribed by the legislature. In *Barclay*, the lower court expressly considered and based its imposition of the death sentence on the defendant's racial motive for committing the murder. This Court rejected the defendant's claim that it was constitutionally impermissible for a state court judge to consider the racial animus that motivated the crime in determining the proper sentence for that crime:

> The United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder.

463 U.S. at 949.

The defendant in *Barclay* had selected a victim for death solely because of the victim's race in order to start a "race war". This Court found that Barclay's motive was material to the conduct proscribed by the statute. The Court also found that consideration of this motive was within the discretion of the sentencing judge and was not "arbitrary and capricious." *Barclay*, 463 U.S. at 950. Conversely, in *Dawson*, the Court found that consideration in sentencing of the defendant's membership in a white power group violated Dawson's constitutional rights because his membership *did not motivate the commission of the crime.* Dawson's motive was completely irrelevant to the harm which the statute was designed to prevent, and thus could not be considered.

The lesson of *Barclay* and *Dawson*, that consideration of a class based motive may be considered when determining an appropriate sentence, supports the constitutionality of the Wisconsin statute. The Wisconsin legislature, like the sentencing judge in *Barclay*, has been invested with the authority to make "important judgments" with respect to punishment. *Barclay*, 463 U.S. at 950. While the sentencing judge makes those judgments within a penalty range, the

legislature prescribes the penalty range in the first instance.[8] Since in a hate crime statute, as in other antidiscrimination laws, the defendant's animus is material to the conduct proscribed by the statute, *see Roberts, supra*, the legislature may take this factor into account in setting the penalty range.

The court below dismissed any analogy to *Dawson*, holding that, while it may be permissible for a judge to consider motive in sentencing for a crime, a legislature cannot separately punish the "evil motive" for that crime. *Mitchell*, 485 N.W.2d at 815 n.17. That argument, however, is premised on the erroneous predicate that motive to commit an offense described by the legislature can never be punished. If, as the lower court suggested, a motive to commit a crime must be equated with abstract thought, then it must also be impermissible for a sentencing judge to consider "motive" as a basis for increasing the punishment of a crime. This Court, in *Barclay* and *Dawson*, counsels otherwise.

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[8] The U.S. Congress performed this function by delegating some of its sentencing responsibility to the United States Sentencing Commission pursuant to 28 U.S.C. §994. Pursuant to this authority, the Commission promulgated Section H, Federal Sentencing Guidelines, which adds two levels to a penalty for a basic predicate offense to "reflect the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights". Introductory Comments, Part H, Section 1, Civil Rights. The enhanced penalties of Section H are associated with federal criminal statutes involving racial, religious, or ethnic crimes such as 18 U.S.C. §§242, 245, and 247.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

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